Supreme Court, U.S.
FILED
APR 10 1998
CLERK

No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS ON THE MERITS

JAMES E. DOYLE
Attorney General
RICHARD BRILES MORIARTY*
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707
Telephone: (608) 267-2796
Counsel for Petitioners

*Counsel of Record

QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action asserting only federal claims under 42 U.S.C. § 1983, must an appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which any court would have dismissed?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

In a removed action asserting only federal claims under 42 U.S.C. § 1983, an appellate court should not, based on the plaintiff having included claims against a State, vacate judgment for petitioners, and remand the entire action to State court. 2

I. Removal jurisdiction exists if the district court has federal question jurisdiction over just one claim 2

II. Section 1983 claims against a State need never be dismissed on Eleventh Amendment immunity grounds since a State is not a "person" under Section 1983 8

III. Eleventh Amendment immunity defenses are for States to use and control and can never defeat removal jurisdiction 11

Page

IV. The claims against the State, properly dismissed in federal district court, would also have been dismissed in State court. 14

A. Section 1983 claims against States will be dismissed in federal or State court. 14

B. There was, and is, no need to determine if there is a futility exception to removal statutes 14

V. The decision below not only lacks any valid legal support and breaches vital constitutional and statutory guarantees but disrupts effective judicial administration 15

CONCLUSION 18

CASES CITED

Alabama v. Pugh,
438 U.S. 781 (1978) (*per curiam*) 12

Ames v. Kansas,
111 U.S. 449 (1884) 3-5, 8

Page

Arizonans for Official English v. Arizona,
117 S.Ct. 1055 (1997) 10-11

C & C Plywood Corp.,
420 F.Supp. 1254 (D.Mont. 1976),
aff'd 583 F.2d 421 (9th Cir. 1978) 5

City of Chicago v.
International College of Surgeons,
118 S.Ct. 523 (1997) 2-4, 8

Collins v. Youngblood,
497 U.S. 37 (1990) 7, 8

Della Grotta v. State of R.I.,
781 F.2d 343 (1st Cir. 1986),
overruled by Will v.
Michigan Dep't of State Police,
491 U.S. 58 (1989) 11

Edelman v. Jordan,
415 U.S. 651 (1974) 11, 12

Ex parte McCardle,
1 Wall. 506, 74 U.S. 506 (1868) 9

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976) 7, 8, 12

Ford Motor Co. v. Department of
Treasury of State of Indiana,
323 U.S. 459 (1945) 12

Page

Glosemeyer v. Missouri-Kansas-Texas R.R.,
879 F.2d 316 (8th Cir. 1989),
cert. denied, 494 U.S. 1003 5

Grubbs v. General Electric Credit Corp.,
405 U.S. 699 (1972) 3

Hans v. Louisiana,
134 U.S. 1 (1890) 13

Hopkins v. Clemson Agricultural College,
221 U.S. 636 (1911) 14

Hutto v. Finley,
437 U.S. 678 (1978) 12

Idaho v. Couer d'Alene Tribe of Idaho,
117 S.Ct. 2028 (1997) 10

In re State of New York,
256 U.S. 490 (1921) 12

Massachusetts v. United States,
435 U.S. 444 (1978) 6

Moor v. County of Alameda,
411 U.S. 693 (1973) 3

Mt. Healthy City Bd. v. Doyle,
429 U.S. 274 (1977) 9, 10, 13

Ngiraingas v. Sanchez,
495 U.S. 182 (1990) 9

Ohio v. Helvering,
292 U.S. 360 (1934) 6

Oklahoma Tax Comm'n v. Graham,
489 U.S. 838 (1989) 3, 6, 7, 8

Patsy v. Board of Regents,
457 U.S. 496 (1982) 9, 10

Patsy v. Board of Regents,
457 U.S. 517 (1982)
(White, J., concurring) 10

Patsy v. Board of Regents,
457 U.S. 519 (1982)
(Powell, J., and Burger, C.J.,
dissenting) 9, 10, 13

Pennhurst State School & Hospital
v. Halderman,
465 U.S. 89 (1984) 3, 6, 8, 11, 12

Puerto Rico Authority v. Metcalf & Eddy,
506 U.S. 139 (1993) 13

Quern v. Jordan,
440 U.S. 332 (1979) 12

Rivet v. Regions Bank of Louisiana,
118 S.Ct. 921 (1998) 7

Romero v. International Term. Operat. Co.,
358 U.S. 354 (1959),
reh. denied, 359 U.S. 962 ..... 3, 4, 6

Schacht v. Wisconsin
Department of Corrections,
116 F.3d 1151 (7th Cir. 1997),
cert. granted, No. 97-461
(January 16, 1998) 3, 14

Seminole Tribe of Florida v. Florida,
116 S.Ct. 1114 (1996) 8

Sloan Shipyards Corp.
v. United States Shipping Bd.,
258 U.S. 549 (1922) 7

Sosna v. Iowa,
419 U.S. 393 (1975) 13

State of Missouri v. Fiske,
290 U.S. 18 (1933) 12

Steel Co. v. Citizens
for a Better Environment,
118 S.Ct. 1003 (1998) 3, 8-11, 13

U.S. Term Limits v. Thornton,
514 U.S. 838 (1995)
(Kennedy, J., concurring) 17

United States v. $277,000 U.S. Currency,
69 F.3d 1491 (9th Cir. 1995) 7

United States v. Finn,
239 F.2d 679 (9th Cir. 1956) 7

United States v. Patterson,
206 F.2d 345 (5th Cir. 1953) 7

Page

United States v. Shaw,
309 U.S. 495 (1940) 7

Welch v. Texas Dep't of Highways
and Public Transportation,
483 U.S. 468 (1987) (plurality) 9, 13

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 11, 14, 16

STATUTES AND RULES CITED

28 U.S.C. § 1447 17

28 U.S.C. § 1447(c) 3

42 U.S.C. § 1983 ..... i, 1, 8-11, 14, 16

S.Ct.R. 24.1(i) 5

S.Ct.R. 24.2 5

CONSTITUTIONAL PROVISIONS

U.S.Const., amend. XI 1, 3, 4, 6, 8-14

No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS ON THE MERITS

SUMMARY OF THE ARGUMENT

Petitioners articulated many reasons for reversing the Seventh Circuit decision: (1) The individual capacity claims, presenting substantial federal questions, sufficiently invoked removal jurisdiction. (2) Eleventh Amendment analysis was unnecessary since States are not "persons" subject to Section 1983 liability. (3) Eleventh Amendment immunity, as a defense for States to use and control, can not diminish federal question jurisdiction over

an action. (4) Remand to the State court, beyond being legally indefensible, served no practical purpose since the claims against the State would be barred in any court. (5) Constitutional and statutory guarantees, and effective judicial administration, would be seriously disrupted if the Seventh Circuit decision stands.

Schacht, in contesting these reasons for reversal, not only confirmed the validity of each one, but provided a concrete example of the adverse impacts which the decision below will have on States and any defendant sued with States. If this action is remanded to Wisconsin courts, he will use his unexpected salvation from near certain defeat on the claims he pursued in the federal courts to instead try to pursue new and different claims against petitioners. The Seventh Circuit decision should be reversed.

ARGUMENT

In a removed action asserting only federal claims under 42 U.S.C. § 1983, an appellate court should not, based on the plaintiff having included claims against a State, vacate judgment for petitioners, and remand the entire action to State court.

I. Removal jurisdiction exists if the district court has federal question jurisdiction over just one claim.

When an action is filed in district court based on federal question jurisdiction, the jurisdictional standards are the same whether it arrives through removal or is initiated in district court. *E.g.*, City of Chicago v. International College of Surgeons, 118 S.Ct. 523, 529 (1997). Just one substantial federal question gives the district court jurisdiction over the action. *E.g.*, City of Chicago, 118 S.Ct. at 530 (removal jurisdiction); Romero v. International Term. Operat. Co., 358 U.S. 354, 359, *reh. denied*, 359 U.S. 962 (1959) (original jurisdiction); Steel Co. v. Citizens for a Better Environment, 118 S.Ct. 1003, 1010 (1998) (original jurisdiction). Schacht's individual capacity claims, standing alone, presented sufficient substantial federal questions to satisfy this criterion. *E.g.*, Moor v. County of Alameda, 411 U.S. 693, 712 (1973).[1]

In determining federal question jurisdiction over an action, it is irrelevant whether a State is, or is not, a party (*e.g.*, Ames v. Kansas, 111 U.S. 449, 463, 470-72 (1884)) or whether Eleventh Amendment immunity may be asserted (*e.g.*, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 117 (1984)). *See also* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841-42 (1989). Each effort by Schacht to create an Eleventh Amendment exception to these general jurisdictional principles runs aground on the decisions of this Court.

The Seventh Circuit, in the decision below and other decisions, held that a district court which cannot adjudicate every claim in a removed action must, despite substantial federal questions, remand the action. (*See* Petitioners brief, p. 11; J.A. 37-40.) Those holdings were overruled in City of Chicago, 118 S.Ct. at 530 (state law claims, over which federal courts lacked original jurisdiction, did not defeat removal since the "federal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the

[1]Removal can be questioned here only on jurisdictional grounds. While Schacht asserts that, had summary judgment been reversed on appeal, he could have, on district court remand, raised unspecified procedural challenges to removal (Schacht brief, 18-19, text and n. 5), he also admits, as he must, that he waived that right shortly after removal. (Schacht brief, pp. 18-19 quoting Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1972).) *See* 28 U.S.C. § 1447(c)).

district courts for purposes of removal. § 1441(a).") *See also* Romero, 358 U.S. at 359.

When Schacht takes up City of Chicago, he tries to cast it aside with a dismissive notation that it "did not involve a state defendant or the Eleventh Amendment." (Schacht brief, pp. 21-22.) Ames clarified, however, that federal question removal jurisdiction is wholly unaffected by whether a State is a party. 111 U.S. at 463, 470-72. Ames should be ignored, Schacht argues, because the State in that removed action was a plaintiff, not a defendant. (Schacht brief, p. 22.) Ames refrained from articulating its holdings that narrowly. 111 U.S. at 463 ("The [removal] statute itself makes no exception of suits to which a state is a **party**" (emphasis added)).

After reviewing the development of removal and original jurisdiction (111 U.S. at 463-70), Ames, in 1884, precluded the position which Schacht now invokes:

> . . . The only question we have to consider is, therefore, whether suits cognizable in the courts of the United States on account of the nature of the controversy, . . . may now be brought in or removed to the [federal] courts **without regard to the character of the parties**. All admit that the [removal] act does give the requisite jurisdiction in suits where a state is not a party, so that **the real question is whether the constitution exempts the states from its operation**.
>
> . . . After bestowing on this subject the most attentive consideration, the court can perceive no reason, founded on the character of the parties, for introducing an exception which the constitution has not made; and we think the judicial power, as originally given, extends to all cases arising under a constitution or a law of the United States, **whoever may be the parties**.

Ames, 111 U.S. at 470-71, bracketing, ellipses and emphasis added. A State being among the defendants removing to district court based on federal questions should not alter the threshold jurisdictional inquiry. *Cf.* Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 318, 320-21 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003; C & C Plywood Corp., 420 F.Supp. 1254, 1257-59 (D.Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978).

Nonetheless, Schacht resists the Ames holdings by arguing that:

> Naturally, the character of the parties is relevant, because the defendants are the parties who seek removal. Removal rights are granted to all defendants - except that special and unusual class of defendants who have Eleventh Amendment immunity and seek removal without being willing to waive it.

(Schacht brief, pp. 22-23.) Schacht fails to support these propositions with any cited authority (S.Ct.R. 24.1(i) and 24.2).[2] Given Ames, there is none. Applicable authority instead points away from any conclusion that a State's invocation of federal question jurisdiction is ever contingent on the State waiving its sovereign immunity.

---

[2]This failure is ironic. Schacht criticizes defendants on five occasions because statements in their brief, which introduced no new propositions and merely summarized adjacent propositions supported by citations, were not followed by repetition of those citations. (*Compare* Schacht brief, p. 23 *with* Defendants brief, pp. 10-14; *also compare* Schacht brief, pp. 24-25, text and n.11 *with* Defendants' brief, pp. 21-25.)

When Pennhurst, in which a State was sued, began "to consider the relationship between pendent jurisdiction and the Eleventh Amendment," its first step was to confirm the application of the general rule that "when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. [Citations omitted.]" 489 U.S. at 117. Since that general rule was reiterated in a case Schacht uses because it involved a State and Eleventh Amendment immunity, he may not avoid the general rule by merely noting that the authority cited by petitioners, Romero, did not involve a State. (Schacht brief, pp. 9 (citing Pennhurst) and 22 (discussing Romero)).

Whether an action is removed to district court or initiated there, the presence of sovereign immunity as a defense is simply irrelevant to a threshold inquiry into federal question jurisdiction over the action. *E.g.*, Oklahoma Tax Comm'n, 489 U.S. at 841-42 (a tribe does not, by asserting sovereign immunity, create federal question jurisdiction justifying removal since sovereign immunity is a defense that does not enter into that threshold jurisdictional inquiry).

No party entitled to sovereign immunity, when invoking the original jurisdiction of a district court, is required to leave that entitlement outside the courthouse door. Massachusetts sued the United States in district court for the express purpose of asserting its sovereign immunity as a bar to certain federal taxes. Massachusetts v. United States, 435 U.S. 444, 452-53 (1978). That immunity claim was resolved on its merits with no hint that entry to the federal courts required its abandonment. 435 U.S. at 443-70. *See also* Ohio v. Helvering, 292 U.S. 360, 366-71 (1934) (Ohio sought "leave to file a bill of complaint invoking the original jurisdiction of this court" to enjoin the United States, based on Ohio's sovereign immunity, from collecting certain taxes).

To the contrary, a party may invoke the jurisdiction of a court while retaining the right to also invoke sovereign immunity as a defense to claims made against the party. *E.g.*, United States v. Shaw, 309 U.S. 495, 497-98 (1940) (United States did not, by affirmatively filing a claim in Michigan probate court, expand waiver of sovereign immunity against a cross-claim beyond congressionally designated boundaries); Sloan Shipyards Corp. v. United States Shipping Bd., 258 U.S. 549, 568-69 (1922) (Board asserting sovereign immunity properly invoked federal question removal jurisdiction but did not prove entitlement to immunity); United States v. $277,000 U.S. Currency, 69 F.3d 1491, 1493 (9th Cir. 1995) (sovereign immunity not waived against counter claim because United States, rather than the claimant, initiated federal court proceedings); United States v. Patterson, 206 F.2d 345, 348, text and n. 7 (5th Cir. 1953) ("it is now well settled that the United States does not waive its sovereign immunity by the institution of an action and does not become subject to an affirmative judgment, at least as to a counterclaim which could not have been asserted against it in an original action") and cases cited; United States v. Finn, 239 F.2d 679, 682, text and n. 18 (9th Cir. 1956) (citing five prior Supreme Court decisions as confirming that "[a]s regards [the United States' immunity as plaintiff] from suits to which Congress has not given plaintiff's consent, and as regards jurisdiction of such suits, there is no distinction between counterclaims and original suits").

Sovereign immunity is a defense. *E.g.*, Collins v. Youngblood, 497 U.S. 37, 41 (1990) ("Eleventh Amendment defense"); Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976) ("Eleventh Amendment defense"). Removal jurisdiction is generally determined on claims made by plaintiffs, not on potential defenses. *E.g.*, Rivet v. Regions Bank of Louisiana, 118 S.Ct. 921, 925 (1998). This is as true of the sovereign immunity defense as any other defense. *E.g.*, Oklahoma Tax Comm'n, 489 U.S. at 841-42. While sovereign immunity is, to be sure, a defense which

commands constitutional attention (*e.g.*, Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1124-28, 1131-32 (1996)), it remains a defense (*e.g.*, Collins, 497 U.S. at 41; Fitzpatrick, 427 U.S. at 453).

There is no Eleventh Amendment exception to the general rule that federal question removal jurisdiction is properly invoked if one substantial federal question is present. *E.g.*, City of Chicago, 118 S.Ct. at 530; Ames, 111 U.S. at 470-71; Pennhurst, 489 U.S. at 117; Oklahoma Tax Comm'n, 489 U.S. at 841-42. Schacht nowhere questions that his individual capacity claims presented substantial federal questions (Petitioners brief, p. 10) and, in fact, admits that only "federal legal issues" were presented in this action. (Schacht brief, p. 21.) As a last attempt to avoid the Court holdings that one substantial federal question creates jurisdiction over an entire action, he asserts that they contradict its other holdings that all defendants must join in removing a single controversy. (Schacht brief, p. 20, text and n.7.) These Court holdings are consistent. They all serve the purpose of keeping court actions whole and avoiding concurrent conflicting actions. (*See* Defendants brief, 10-11.) The general rule controls.

The Seventh Circuit erred in not ending its jurisdictional inquiry by simply noting that substantial federal questions were presented at time of removal. This was the first of many errors.

II. Section 1983 claims against a State need never be dismissed on Eleventh Amendment immunity grounds since a State is not a "person" under Section 1983.

Schacht cites Steel Co. to refute petitioners' position that, because States are not "persons" under Section 1983, the Eleventh Amendment bar to Section 1983 claims

against States did not need to be considered. (Schacht brief, p. 13.) Not only does Schacht ignore a critical authority underlying petitioners' position, Ngiraingas v. Sanchez, 495 U.S. 182 (1990), but Steel Co. actually emphasizes that petitioners are correct.

Steel Co. held that a federal court must, when its jurisdiction over an action is in doubt, proceed directly to that question and that, if jurisdiction over the action is lacking, the only alternative is dismissal. 118 S.Ct. at 1012, citing Ex parte McCardle, 1 Wall. 506, 514, 74 U.S. 506 (1868) and other Court decisions. Steel Co. confirms that Eleventh Amendment immunity does **not** deprive a district court of jurisdiction over an action. 118 S.Ct. at 1010. Otherwise, the Court would never defer looming Eleventh Amendment issues by instead searching for other grounds to dismiss claims which give rise to those issues. *E.g.*, Ngiraingas, 495 U.S. at 185, n.2 and 192, n.12 (analyzed in Petitioners brief, pp. 18-19); Mt. Healthy City Bd. v. Doyle, 429 U.S. 274, 276-82 (1977) (first analyzing contention that the Board was not a "person" under Section 1983 and, finding that contention waived, only then addressing Eleventh Amendment issues); *See also* Patsy v. Board of Regents, 457 U.S. 496, 516, n. 19 (1982) (ruling on merits despite presence of potential Eleventh Amendment bar). *See also* Welch v. Texas Dep't of Highways and Public Transportation, 483 U.S. 468, 492-93 (1987) (plurality) noting that the Court, in past decisions, "avoided" troubling Eleventh Amendment issues.

Schacht contends that petitioners read too much into footnote 19 in Patsy and that the words the majority chose to use there were undercut by its citation to Mt. Healthy. (Schacht brief, pp. 17-18.) If anything, petitioners may have understated the meaning of the footnote. *See* Patsy v. Board of Regents, 457 U.S. 519, 520-32 (1982) (Powell, J., and Burger, C.J., dissenting). *See esp. id.* at 524-25, text and n. 9 and 531-32 (criticizing the holdings in this footnote at length). Although the

dissent questioned if there was a link missing between the Eleventh Amendment holdings in this footnote and its Mt. Healthy citation (Patsy, 457 U.S. at 524, text and n.9 (Powell, J., and Burger, C.J., dissenting), the majority retained this citation (Patsy, 457 U.S. at 516, n. 19). After all, Mt. Healthy had, as in Patsy, **analyzed** a nonjurisdictional issue first and diverged from Patsy because, finding the nonjurisdictional issue waived, it ultimately had to reach the immunity issue. 429 U.S. 274, 276-82. Petitioners' reading of this footnote is consistent with its citation to Mt. Healthy. The point, Steel Co. confirms, is what any federal court is compelled to do first in each action (118 S.Ct. at 1012), not if it ultimately resolves any immunity issues.

If Eleventh Amendment immunity, whenever it bars a claim, was a jurisdictional black hole which drains federal district courts of all power over an action, Patsy would not have deferred immunity issues, citing the perceived wishes of the State defendant, to instead address a merits issue. 457 U.S. at 516, n. 19. *See also* Patsy v. Board of Regents, 457 U.S. 517, 519, n. (1982) (White, J., concurring) (stating no objection to "leaving the Eleventh Amendment issue for further consideration by the lower courts" absent some logical priority for resolving Eleventh Amendment immunity before the nonjurisdictional issue of exhaustion of remedies). Patsy ruled as it did precisely because Eleventh Amendment immunity does **not** render a federal court "altogether disqualified from hearing certain suits brought against a State." Idaho v. Couer d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2033 (1997).

Schacht, like the Seventh Circuit, missed the point made in Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1069-70 (1997) that the definition of "persons" in Section 1983 should be addressed before looking at any effect Eleventh Amendment immunity may have on Section 1983 claims. Arizonans did not, as Schacht contends, conduct an inquiry into whether Eleventh Amendment

immunity was waived. (Schacht brief, pp. 12, 15-16.) Instead, citing Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), it implied the appellate court in Arizonans was wrong for the same reason Will had implied Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986) was wrong: for **examining** whether a State had waived Eleventh Amendment immunity against a Section 1983 claim when that constitutional analysis was avoidable because States are not "persons" under Section 1983. Arizonans, 117 S.Ct. at 1069-70; Will, 491 U.S. at 61, n.3. *See* Petitioners brief, pp. 15-19.

"'Jurisdiction . . . is a word of many, too many, meanings.' [citation omitted]." Steel Co., 118 S.Ct. at 1010. While a jurisdictional issue, Eleventh Amendment immunity plainly does not deprive a district court of original jurisdiction over an action. Instead a district court may well have constitutional authority to hear an action, and even determine it has jurisdiction over a particular claim pled in that action, but be barred by the Eleventh Amendment from awarding relief as to that claim. *E.g.*, Pennhurst, 465 U.S. at 120-21 citing Edelman v. Jordan, 415 U.S. 651, 653, n.1 and 678 (1974). The Seventh Circuit, if concerned about the claims against the State, should have looked first to the definition of "person" under Section 1983 and, recognizing those claims were baseless as a nonjurisdictional matter, returned to the merits of the appeal. Regardless, Eleventh Amendment immunity is for the States, not federal courts, to use and control.

III. Eleventh Amendment immunity defenses are for States to use and control and can never defeat removal jurisdiction.

According to Schacht, federal courts must, whenever a State is sued, determine, at the outset, whether Eleventh Amendment immunity is a potential bar to any claim and,

if so, dismiss the entire action for lack of subject matter jurisdiction. He cites numerous decisions as evidence that, whenever claims are made against a State, a federal district court must, on its own, immediately address the possibility that Eleventh Amendment immunity could be asserted and then either entirely exclude it as a potential bar or refuse to exercise jurisdiction over the action. (Schacht brief, pp. 8-11, 14, 17-18 and cases cited.)

It suffices to observe that Schacht located no Court decision in which the federal courts, rather than parties potentially protected by Eleventh Amendment immunity, raised the issue. To the contrary, in every decision cited to support his position, Eleventh Amendment immunity was raised by the defendants and **not** by the federal courts. Pennhurst, 465 U.S. at 95-96 (the appellate court "rejected [the State's] argument that the Eleventh Amendment barred a federal court from considering a pendent state-law claim"); Quern v. Jordan, 440 U.S. 332, 333 (1979) (a "sequel" to Edelman where the State asserted Eleventh Amendment immunity (415 U.S. at 658-59)); Alabama v. Pugh, 438 U.S. 781, 782 (1978) (*per curiam*) (Eleventh Amendment immunity asserted by defendants); Hutto v. Finley, 437 U.S. 678, 689 (1978) ("The Attorney General . . . contends that any award of fees is prohibited by the Eleventh Amendment"); Fitzpatrick, 427 U.S. at 453 ("the Eleventh Amendment defense is asserted"); Edelman, 415 U.S. at 658-59 (the State "contended . . . that the Eleventh Amendment barred the award of retroactive benefits"); Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459, 466-67 (1945) (after defending on the merits, the State raised and argued Eleventh Amendment immunity "in this Court"); State of Missouri v. Fiske, 290 U.S. 18, 21-22 (1933) ("The state appeared specially and moved to dismiss [in part because] it was a suit against the state, which had not consented to be sued, in violation of the Eleventh Amendment"); In re State of New York, 256 U.S. 490, 496 (1921) (the State sought dismissal because "they were suits against the state

of New York in which the state had not consented to be sued" and pursued prohibition and mandamus after request denied); Hans v. Louisiana, 134 U.S. 1, 3 (1890) (the State asserted to lower court that "'Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state"); Welch, 483 U.S. at 471 (citing district court decision, 533 F.Supp. 403, 404 (S.D.Tex. 1982) which noted the State moved for Eleventh Amendment dismissal); Puerto Rico Authority v. Metcalf & Eddy, 506 U.S. 139, 141 (1993) (defendant had sought dismissal, based on Eleventh Amendment immunity, in district court); Mt. Healthy, 429 U.S. at 276-81 ("consider[ing] an admixture of jurisdictional and constitutional claims" by the Board (429 U.S. at 276), of which the third was "whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment" (429 U.S at 279-81)).

The Court may safely assume that this failure to cite a genuinely supportive citation was not due to faulty research. The Patsy dissent, in arguing against the majority view that Eleventh Amendment immunity is for States rather than courts to pursue, faced a similar challenge of showing that federal courts had, without any defendant having raised Eleventh Amendment immunity, used it as a jurisdictional bar. Patsy, 457 U.S. at 524, text and n.9 (Powell, J., and Burger, C.J., dissenting). The closest it came was Sosna v. Iowa, 419 U.S. 393 (1975) in which, in the words of the Patsy dissent, "the Court raised the question of the Eleventh Amendment even though the State **had** asserted the bar of the Amendment only in its answer to the complaint and had thereafter abandoned the **defense** in this Court." 457 U.S. at 524, text an n.9 (Powell, J., and Burger, C,J., dissenting), emphasis added.

Locating just one decision would not have turned the tide. Schacht's position fails, under Steel Co., unless the Court had, every time a claim was made against a State, examined Eleventh Amendment immunity, whether

raised or not, as a threshold jurisdictional matter. His own citations, and the Patsy dissent, demonstrate that his position is far afield from this Court's decisional law.

Eleventh Amendment immunity is a "prerogative" of the States (Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642-43 (1911)). Schacht admits that it is a "card" for States "to use." (Schacht brief, p. 8.) The Seventh Circuit erred by deeming Eleventh Amendment immunity a deathknell to removal. Its accumulated errors, beyond being contrary to the Court's decisions and the removal statutes, served no practical purpose. Section 1983 claims against a State are nonstarters in any court.

IV. The claims against the State, properly dismissed in federal district court, would also have been dismissed in State court.

A. Section 1983 claims against States will be dismissed in federal or State court.

Schacht admits that his claims against the State were defective because States are not "persons" under Section 1983. (Schacht brief, pp. 12-13 and 15 (quoting Will).) He apparently admits, as did the Seventh Circuit (J.A. 39), that this defect barred those claims in any court. (Schacht brief, pp. 14-15 (quoting Will) and 27 (asking why dismissal was not sought on this ground before removal.)

B. There was, and is, no need to determine if there is a futility exception to removal statutes.

Petitioners did not seek reversal based on any "futility exception" to removal jurisdiction. Though

petitioners could avoid State court remand if an exception exists, their position depends on the Court concluding that the district court had removal jurisdiction. (Petitioners brief, pp. 10-30.) If it concludes otherwise, petitioners expect to relitigate this action in the Wisconsin courts.

Schacht nonetheless consumes considerable brief space examining the options open to a district court which **lacks** removal jurisdiction. (Schacht brief, pp. 29-41.) Petitioners again suggest that the parties' discussion of a potential "futility exception" be used merely to recognize a split in the circuits and to leave that issue open for a more appropriate case. (*Compare* Petitioners brief, pp. 29-30 *with* Schacht brief, pp. 29-41.) The briefs confirm that the First Circuit requires remand where a meaningful State law result is only unlikely rather than futile, the Second Circuit declined to reach the issue, the Third, Fourth and Seventh Circuits have held that no futility exception exists and the Fifth, Sixth and Ninth Circuits have held a futility exception does exist. (*Compare* Petitioners brief, pp. 29-30 *with* Schacht brief, pp. 29-41.) The issue should await a case which sharply defines the conflicting reasons why a "futility exception" should, or should not, be recognized. This is not that case.

V. The decision below not only lacks any valid legal support and breaches vital constitutional and statutory guarantees but disrupts effective judicial administration.

States and any defendants sued with States are entitled to use the tools available to all litigants. Where federal questions are posed in a State court action, removal is among those tools. Schacht questions petitioners having used that tool here by speculating that they both had a "home court advantage" in Wisconsin courts **and** gained an "unfair advantage" by removing to federal court. (Schacht

brief, pp. 26 and 29.) It is far from a safe assumption that State defendants sued on federal law claims have an "advantage" in one court system as opposed to the other. *E.g.*, Will, 491 U.S. at 60-61 (State circuit court entered judgments against the State on the Section 1983 claims which Will later held invalid). Nonetheless, if his assertion that State defendants are generally treated more favorably in their own courts were true, it would suggest that State defendants choose to remove to federal court with even greater care and deliberation than other defendants.

His theories on why petitioners chose to remove are factually baseless and legally irrelevant. He creates reasons that petitioners removed this action, impugns those imagined reasons and asserts there was no "need" to remove. (Schacht brief, pp. 6-8, 16, n.3, 23-29.) Removal is an **option** and a party's strategic reasons for removal, even when known, provide no basis for challenging removal. 28 U.S.C. § 1447. Courts rarely test the propriety of a litigation decision on the mental processes of attorneys representing litigants. The reasons Schacht chose to assert claims clearly precluded by the language of Section 1983 would be intriguing to explore, but that is as irrelevant as the reasons petitioners chose to remove.

Regardless, any litigant facing federal law claims in State court actions, including State defendants, might hesitate to entrust resolution of those claims to State courts which only rarely address federal law issues rather than to federal judges with developed expertise who daily resolve federal law claims and, of particular importance to State defendants, specialized defenses such as qualified immunity. Neither the Seventh Circuit nor Schacht may burden the simple and efficient removal system created by Congress with criteria which Congress chose not to impose. (28 U.S.C. § 1447.)

Petitioners noted the general havoc which the Seventh Circuit decision would cause. (Petitioners brief,

pp. 31-36.) Schacht reveals that the havoc would begin in this action and be immediate and concrete. He would use a remand to the Wisconsin courts to assert new State law claims he first mentions here in this Court. (Schacht brief, pp. 16-17 and 40.) He seems to acknowledge, by searching for new claims rather than trusting to those he prosecuted in federal court, that the merits briefs filed with the Seventh Circuit and the record confirm the near certainty that petitioners will ultimately prevail on the merits even if this action starts over in the Wisconsin courts. (Petitioners' Seventh Circuit Merits Brief, pp. 4-27 (Statement of Facts), and D-Ap. 101-166 and 176-203 (R. 30, 31 and 32 (district court filings showing admissions by Schacht)).) All that is presently unknown in this particular action is whether the resources the petitioners must apply to achieve this ultimate result are minimal or considerable.

Petitioners can absorb the extra resources a remand to the Wisconsin courts would require. The delicate balance which is our federalist structure is in far greater jeopardy. "The Framers split the atom of sovereignty." U.S. Term Limits v. Thornton, 514 U.S. 838, 838 (1995) (Kennedy, J., concurring). Atoms, and sovereignties, which share space remain "split" only with constant vigilance and effort. The Constitution looks to this Court to monitor the balance created by the Framers and to assure the atom of sovereignty remains split. To deprive States, and those sued with States, of basic rights granted all defendants because States, as fellow sovereigns, are entitled to immunity defenses, would not just permanently alter the simple and efficient removal structure chosen by Congress but disregard the delicacy of the vital balance chosen by the Framers. U.S. Term Limits, 514 U.S. at 838 (Kennedy, J., concurring).

Responding to the concerns petitioners expressed about the broader effects of the Seventh Circuit decision, Schacht only confirmed the validity of those concerns.

CONCLUSION

Petitioners ask that the decision below be reversed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796